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ABSTRACT

This paper, presented at the annual meeting of the National Association of Biology Teachers, is focused on legal and judicial problems in mandating equal time for creationism. Past events provide evidence that legislation, policies, and local resolutions that require science textbooks and curricula to include the Genesis account of creation are unconstitutional. Now, scientific creationism, rather than biblical creationism, is being promoted to neutralize the study of evolutionary theory. However, even the proponents of creationism admit that creation science is not scientific when they say it lies beyond the limits of empirical science, it does not provide a testable scientific theory, and it cannot be disproved. To counter the argument that creationism is religious, the creationists claim that evolutionary theory is religious theory and is an important tenet of secular humanism which they term the religion of the modern age. While the courts have affirmed the right of schools to include evolution in the curriculum without such instruction constituting coercion against religious exercise, questions of academic freedom if creationism is or is not taught have not been resolved. (PB)

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LEGAL AND JUDICIAL PROBLEMS IN MANDATING EQUAL TIME FOR CREATIONISM

by

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at the
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of the
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During the 1900's, anti-evolutionists have used various strategies to eliminate or neutralize the presentation of evolution in the science curricula of public schools. As a result of these efforts, laws have been passed, judicial rulings made, and legal opinions stated which, either directly or indirectly have answered many questions inherent to the controversy surrounding the teaching of evolution in the public schools. Included among the questions are: Can the teaching of evolution be prohibited by law? Are legislative and school board mandates that require the Genesis account of creation receive balanced treatment with evolution in science curricula constitutional? Would the teaching of scientific creationism entangle the government with religion? Does exclusive instruction in evolutionary theory burden the free exercise of religion? Is evolutionary theory religious dogma? Does exclusive instruction in evolutionary theory violate the academic freedom of students? Do laws requiring the teaching of scientific creationism violate the academic freedom of teachers and students? This paper considers some of the judicial and legal answers that have emerged for these and other questions.

First, can the teaching of evolution be prohibited by law? During the 1920's, 37 bills were introduced in 20 states that proposed to make the teaching of evolution illegal in the public schools. Bills prohibiting the teaching of evolution were proposed in Tennessee, Arkansas, and Mississippi. In 1968, the U.S. Supreme Court ruled that an Arkansas law prohibiting the teaching of evolution was unconstitutional. The court ruled that the law was not an 'act of religious neutrality" as "The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read" (Epperson v.

Arkansas, 393 US 97, 237). The court also stated that

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and nonreligion. (Epperson v. Arkansas, 393 US 97, 234).

Overall, the Supreme Court saw the law "contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution" (Epperson v. Arkansas, 393 US 97, 237). Thus, antievolution legislation was declared unconstitutional in Arkansas and rendered unenforceable in Mississippi. Tennessee's law was repealed.

In 1972, plaintiffs went before a U.S. District Court to enjoin the Houston Independent School District and the Texas State Board of Education from teaching the theory of evolution and from adopting textbooks that presented the theory without critical analysis and excluded other theories about the origin of humans. The judge dismissed the case and reemphasized the requirement that the state be neutral in matters of religion. The judge also stated that "Teachers of science in the public schools should not be expected to avoid the discussion of every scientific issue on which some religion claims expertise" (Wright v. Houston Independent School District 366 F. Supp. 1208, 1211).

Overall, contentions that evolution should not be taught in the classroom have been rejected. Any such prohibition would be seen as a violation of the requirement that the state be neutral in matters of religious theory, doctrine, and practice.

If evolution is prescribed as part of the curriculum, there is judicial support for the position that teachers cannot omit it because it

conflicts with their religious views. In Palmer v. Board of Education of City of Chicago, the court ruled a teacher could not disregard parts of the curriculum that conflicted with her religious views. The court ruled she had "no constitutional rights to require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy" (603 F. 2d at 1274). The U.S. Supreme Court declined to review this decision.

After anti-evolutionists saw that the teaching of evolution could not be prohibited by law, they began lobbying state legislatures, state and local boards of education, and textbook committees to adopt laws or policies that required the study of evolution to be neutralized by giving equal consideration to the biblical account of the origin of life as recorded in Genesis. This account, when interpreted literally and dated using biblical chronologies, holds that 6,000 years ago all forms of life, including humans, were created in a single burst of creation as discrete and immutable types. Around 2400 B.C., a large number of the organisms became extinct during the Noachian deluge and flood sent by God.

These legislative attempts encountered serious constitutional problems. In 1973, a law was passed in Tennessee that stipulated that alternative theories of creation, including the Genesis account, be included in textbooks that discuss evolution. This law was restrictive in that it prohibited the teaching of all occult or satanical beliefs of human origin.

The Tennessee law was declared unconstitutional by both the Tennessee Supreme Court and the United States Sixth Court of Appeals. The federal court ruled this legislation gave "a clearly defined preferential position for the biblical version of creation" and thus was unconstitutional as "the First Amendment does not permit the State to require that teaching

and learning must be tailored to the principles or prohibition of any religious sect or dogma" (Daniel v. Waters, 515 F. 2d 485, 489). The Court also emphasized the U.S. Supreme Court ruling in Epperson v. Arkansas that government must not aid, foster, or promote one religion or religious theory against another.

In 1975, the Creationist textbook A Search For Order in Complexity was approved for adoption in Indiana by the state textbook commission. A state judge ruled the action violated state and federal constitutions as the adoption of the textbook "both advanced particular religious preferences and entangled the state with religion" (Hendren v. Campell, 1977, p. 39). The judge also asserted that the purpose of the textbook was "the promotion and inclusion of fundamentalistic Christian doctrine in the public schools."

These decisions make it obvious that legislation, policies, and local resolutions that require science textbooks and curricula to include the Genesis account of creation are unconstitutional. W. R. Bird, an attorney with the Institute for Creationist Research and a longtime advocate for equal time for scientific creationism, conceded this in stating that the "presentation of biblical creation would contravene the establishment clause and thus could not be employed to neutralize a public school course" (Bird, 1977, pp. 553-554).

Because of these constitutional entanglements, antievolutionists now advocate the use of scientific creationism, rather than biblical creationism, to neutralize the study of evolutionary theory. This year laws were passed in Arkansas and Louisiana that mandate balanced treatment be given to evolution and creationism or "creation-science." The Arkansas law defined "creation-science" as:

> . . .the scientific evidences for creation and inferences from those scientific evidences. Creation-science includes

> the scientific evidence and related inferences that indicate: (1) Sudden creation of the universe, energy, and life from nothing; (2) The insufficiency of mutation and neutral slection in bringing about development of all living kinds from a single organism; (3) changes only within fixed limits of originally created kinds of plants and animals; (4) Separate ancestry for man and apes; (5) Explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (6) A relatively recent inception of the earth and living kinds. (State of Arkansas, Act 590 of 1981, p. 2)

Is scientific creationism as defined here scientific or is it biblical creationism without theological terminology? In a complaint filed against the Arkansas law by many parties, including The National Association of Biology Teachers, it was charged that "creation-science" is religious doctrine and embodies and reflects "particular religious beliefs not shared by adherents of other religious beliefs, or by those who hold no religious beliefs" (Ennis, et al., 1981, p. 12). The complaint stated that "creation-science" was not science because it cannot be subjected to disproof. Furthermore, the complaint argued the law's "principal and primary effect is to advance religion" and the law entangled government with religion.

Proponents of creationism have been unwilling or unable to present evidence that their tenets are scientific. Furthermore, they now admit creationism is not scientific. Duane Gish, Associate Director of the Institute for Creationist Research, recently wrote that "as a creation scientist, I wish to point out that creation-science scientists readily acknowledge that creation is not a scientific theory. The concept of creation lies beyond the limits of empirical science; it does not provide a testable scientific theory, not can it be disproved" (1981, p. 20).

Creationism's failure to attain the status of scientific theory and its inability to move beyond its religious base has impeded its introduction in science curricula. In 1975, the Attorney General of California in a legal opinion stated that scientific creationism had an inherent religious

basis and "its status as religious belief impedes its introduction into the textbooks because of the breadth of the First Amendment" (Younger, 1975, p. 16). In the recent and well-publicized creationist trial in California, the plaintiffs dropped their request for equal time for creationism in the science curricula. The presiding judge commented that "it was appropriate that they do so" as he had "no doubt whatever that such an accommodation would be held to be violating the establishment clause" (Sacramento Creationist Trial, p. 1).

Thus, there are arguments and rulings that creationism is religious and entangles government with religion. The opposite argument is also made. Creationists argue that evolutionary theory is religious theory and, in particular, an important tenet of secular humanism. Whitehead and Conlan (1978) claimed secular humanism was "the religion of the modern age" (p. 54) and "its unconstitutional establishment within our governmental organs" must be prohibited (p. 65). Bird (1979) also argued that exclusive instruction in evolution established a liberal, humanist, or nonatheistic or secularistic religion" (p. 204).

Do either creationsm or evolution promote religious dogma and entangle state and religion? In Abington v. Schempp, the U. S. Supreme Court ruled that in order to "withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion" (374 U. S. at 222). In Crowley v. Smithsonian Institution, the plaintiffs argued that the Smithsonian in presenting an exhibit concerned with evolution was establishing the religion of secular humanism and violating the neutrality requirement of the First Amendment. The judge rejected the allegation and stated the "museum's presentation of evolutionary theory has the solid secular purpose of 'increasing and diffusing

knowledge among men' as to scientific learning on creation and environmental adaptation" (462 F. Supp. at 727). Also the court agreed the ruling in Wright v. Houston Independent School District that "the connection between religion", as employed in the first amendment, and Defendants' approach to the subject of evolution" was "too tenuous a thread on which to base a first amendment complaint" (366 F. Supp. at 1210). Thus, neither of these courts accepted the plaintiff's allegation that evolution was a religion or advanced a religion. In Seagraves v. Sate, No. 278978, the plaintiffs dropped the portion of the complaint that dealt with evolution as secular humanism after the judge indicated that "the syllogism for the acceptance of evolution as secular humanism was illogical" (Mayer, 1981, p. 3). In an earlier opinion Younger (1975) answered the creationist argument that evolution was dogma and advanced agnostic or atheistic beliefs by stating it was "unlikely to the point of improbability that a court would find that a scientific treatment of evolution in science textbooks is, directly or indirectly, the advancement of an agnostic or atheistic belief" (p. 14). James Brown (1980), Attorney General of Oregon in answering arguments that evolution advances atheistic or agnostic dogma, stated that he could find no support in the decisions of the United States Supreme Court for such arguments. In Malnak v. Yogi (592 F2d at 197) the judge stated:

> It is widespread practice in high school biology courses, for instance, to include discussions of Darwin's theory of evolution. This theory is offensive to some religious groups but it is not in itself religious.

These rulings and opinions appear to make efforts to brand and ban evolution as a religion seem futile. Despite his earlier allegations, Bird (1979, 1980) in developing his legal arguments against exclusive instruction of evolution, conceded this in stating that the theory of evolution was not religious in nature.

Do legislative or policy-making actions that mandate the teaching of creationism meet the test of secular purpose and avoid entangling religion with government? Excessive entanglement is present if "comprehensive, discriminating and continuing state surveillance will inevitably be required to ensure the rules are obeyed and the First Amendment respected" (403 U. S. at 619). The secular purpose seems to be violated when "the activity is one which is so clearly religious in nature as to make a sham of the stated purpose" (Smith and Hayes, p. 365).

Judging from the statements and materials produced by the proponents of equal time for creationism, surveillance will be required to ensure the First Amendment is respected. Furthermore, these statements and materials serve as evidence that the laws and policies they seek have purposes that are not secular.

For example, Nell Seagraves, who started the Creation Research Society in San Diego and whose son and grandchildren were plaintiffs in the Sacramento creationist trail, "freely asserts that the purpose of the movement is 'to get the biblical belief system into the schools' and the evolution heresy out" (Vivrano, 1981, p. 30). Henry Morris (1974), director for the Institute for Creation Research stated "We seek not only to win scientists to Christ, but even to win the sciences themselves to Christ" (p. 215). In discussing the goals of the Institute for Creation Research in January, 1981, Morris stated that "a repudiation of evolutionary humanism, and a return to true belief in God as Creator and Sovereign of the the Universe is prerequisite to any real solution of human problems, . . ." (Morris, 1981, p. 4). In an earlier ICR newsletter, Morris (1973) stated that "A revival of solid belief in special creation, especially among young people, could easily spark the greatest movement of the true evangelism and Christian consecration of modern times."

An ICR survey in 1976 showed some previous success in achieving these goals of conversion and faith maintenance. Eighty people indicated the ICR ministry had been instrumental in leading them to Christ. Another 850 said it "had been effective in helping them win others to Christ" (Gish and Rohrer, 1978, p. 225). Specific comments from individuals returning the ICR questionnaire included:

> My opportunities to witness for Christ in a public classroom setting has increased from practically nothing to a common occurrence (p. 227).
>
> This literature has helped some of my students to accept creation and to believe in Christ (p. 226).
>
> I as a science teacher have seen that students must see Christ as Creator before they will ever see Him as a "Purpose Giver" (p. 229).

Morris concluded from this survey that:

> It is now evident, both from scripture and from experience, that scientific Biblical creationism can and should play a vital role in evangelism and in Christian faith and life, as well as in true science and education (Gish and Rohrer, 1978, p. 231).

These and other statements indicate that some of the leaders of the creationist movement are interested in promoting equal time for creationism for sectarian reasons. As a result, it seems clear much state surveillance would be required to keep religious positions and doctrines out of the classroom in school districts where creationism is mandated and taught.

Materials published by creationist for use in public school classrooms also have the potential to entangle government and religion if used. The Battle For Creation is recommended as a reference in the public school edition of Origins Two Models Evolution Creation. This recommended reference has a chapter titled Creation and Christian Life that is loaded with doctrinal positions, scriptural references, and evangelistic messages. Included in other parts of this book are scriptural references and doctrinal positions

regarding creation and Christian witnessing, creation and the virgin birth of Christ, and the gospel of creation.

Recent textbooks and modules published by creationist authors for public school classrooms appear to omit references to the Bible and God. However, they consistently rely on a supernatural Creator and supernatural processes to answer many questions about the origin, unity, and diversity of life. Because of this, the plaintiffs in the suit against Arkansas Act 590 of 1981 alleged that "'creation-science' cannot be taught without reference to that religious belief in a Creator." For this and other reasons, the plaintiffs in the Arkansas suit argue the balanced treatment legislation will entangle government with religion (Ennis, et al., 1981, p. 13).

State and religion could become entangled in other curricula areas if creationists achieve their goals. The ICR goals for 1981 included the development of "two-model" books in every subject and at every level (Morris, 1981). During the 1981 Texas textbook adoption proceedings, there were several demands that specific areas in textbooks be neutralized by biblical ideas. For example, social studies textbooks that discussed the human transition from nomadic hunters and gatherers to farmers were criticized for not including Cain's "theory." According to this so-called theory, farming could not have been preceded by hunting and gathering because Cain, the son of Adam, was a farmer. Psychology textbooks were criticized for not including Judeo-Christian viewpoints. Textbooks were criticized for contradicting or not including biblical ideas on the role of women, marriage, sex, and child raising. One petitioner argued against the inclusion of the metric system in an earth science textbook because "If the Lord had meant for the decimal system to be used he would have had 10 apostles" (Texas Education Agency, 1930, p. 78).

These and other examples of protests lodged against textbooks illustrate how equal time legislation for ideas derived from the Bible have the potential to entangle state and religion and make the tasks of teachers, authors, and publishers nearly impossible.

Arkansas Act 590 of 1981 states that:

> Public school presentation of only evolution-science without any alternative model of origins abridges the United States Constitution's protections of freedom of religious exercise and of freedom of belief and speech for students and parents, because it undermines their religious convictions and moral or philosophical values, compels their unconscionable professions of belief, and hinders religious training and moral training by parents (4).

This statement reflects the legal opinion of ICR attorney Wendell Bird (1978, 1979, 1980) who argued countervailing viewpoints, such as creationism, must be used to neutralize the teaching of evolution and prevent the abridgement of the free exercise of religion for many students. This argument has been advanced in court and rejected. Most recently, the judge in the California creationist trial ruled that the plaintiffs' free exercise of religion was not violated by any action of the State Board of Education (Seagraves v. State, No. 278978). In Crowley v. Smithsonian Institution, the plaintiffs argued that evolution exhibits violated the establishment and free exercise clauses of the First Amendment. The judge rejected the argument and indicated the government was not required to protect the plaintiff from a display that was offensive to his religious beliefs (462 F. Supp. 725). The plaintiffs in Wright v. Houston Independent School District also claimed that the exclusive instruction of evolution discouraged and restrained the free exercise of their religion and they were being denied the equal protection of the laws. The judge dismissed the

case on the grounds that the plaintiffs failed to state a claim upon which relief could be granted. He also stated that evolution was "peripheral to the matter of religion" and that it was "not the business of government to suppress real or imagined attacks upon a particular religious doctrine" (366 F. Supp. at 1217). Overall, three judges have rejected the claim of Arkansas Act 590 of 1981 that exclusive treatment of evolution violates the religious freedom of students.

Arkansas Act 590 of 1981 also incorporates the creationist argument that exclusive instruction in evolution violates the academic freedom of students because they are indoctrinated in evolution and denied a choice between scientific models. The students' right to receive certain educational information is not an absolute right and only recently has begun to be defined by the courts (Estreicher, 1980). The state's right to prescribe school curricula has been recognized in Epperson v. Arkansas and several other judicial decisions. Decisions that restrict the dissemination of certain ideas and content and are not based on reasonable educational goals and concerns should be challenged in courts. Inasmuch as creationism lacks power to explain the natural world, is not useful for directing future research, and is considered a fringe idea by nearly all biologists it seems unlikely a case could be made that its absence from the science curriculum is a violation of reasonable educational goals. Also, as mentioned earlier, the presence of creationism in the science curriculum could entangle government and religion. For these reasons, the absence of creationism from the science curriculum seems not to be a violation of students' right to know and academic freedom. Also the absence of creationism in schools hardly can be attributed to censorship. Pracically every college in America

before the Civil War had a senior course taught by the president of the college which presented aspects of divine design in nature as offered in the writings of William Paley. The fixity of species and the Creator's design as reflected in nature were stressed in these courses. In 1876, John Hopkins University designed courses in the life sciences that took a secular approach and were not limited by religious assumptions or traditional viewpoints (Peterson, 1970). As this rational spread, science courses emphasizing aspects of the divine design in nature slowly disappeared. It was not censorship but a failure of prevailing creationist ideas to explain the natural world that caused this shift in the curricula.

One of the plaintiffs' complaints against Arkansas Act 590 of 1981 is that it violates the academic freedom of both students and teachers. The plaintiffs argue that the law requires science teachers "to teach as science a doctrine which they, as professionals, believe has no scientific basis" (Ennis, et al., p. 14). They also argue the law deprives students of their "constitutionally protected right to acquire useful knowledge" (p. 14). The test for the argument of the plaintiffs again seems to be whether the requirement that creationism be given balanced treatment with evolution is based on a reasonable educational purpose. If laws requiring balanced treatment of creationism with evolution do not entangle the state with religion and are based on reasonable educational purpose, then the academic rights of students and teachers have not been violated.

In summary, the courts have affirmed the right of schools to include evolution in the curriculum. Courts have ruled that exclusive instruction about evolution does not constitute coercion against religious exercise.

Laws mandating the teaching of biblical creationism in science have been judged unconstitutional. No court has recognized scientific creationism as science or evolution as religion. Questions of academic freedom if creationism is or is not taught have not been resolved. Many of these issues should be clarified and decided in federal court in Little Rock, Arkansas in December.

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